

(2)

No. 90-318

Supreme Court, U.S.

**FILED**

SEP 7 1990

JOSEPH F. SPANIOLO, JR.  
CLERK

---

In The  
**Supreme Court of the United States**  
October Term, 1990

---

CARL W. TINNON, LOLA TINNON, BITUMINOUS  
FIRE & MARINE INSURANCE COMPANY and  
STOR-ALL MANUFACTURING COMPANY,

*Petitioners,*

v.

BURLINGTON NORTHERN RAILROAD COMPANY,

*Respondent.*

---

On Petition For Writ Of Certiorari To The  
United States Court Of Appeals For The  
Eighth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

---

J. C. DEACON  
BARRETT, WHEATLEY, SMITH &  
DEACON  
Post Office Box 4057  
Jonesboro, Arkansas 72403  
(501) 932-6694  
*Attorney for Respondent*

---

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964  
OR CALL COLLECT (402) 342-2831

---

**BEST AVAILABLE COPY**

**QUESTION PRESENTED**

Should this court review a decision of the United States Court of Appeals for the Eighth Circuit affirming the District Court's denial of the petitioners' motion for new trial following a jury verdict for the respondent when the petitioners seek review of a jury instruction which the Court of Appeals found proper?

## LIST OF PARTIES

Petitioners are Carl W. Tinnon, Lola Tinnon, Bituminous Fire & Marine Insurance Company and Stor-All Manufacturing Company.

Respondent is Burlington Northern Railroad Company.\*

---

\*Burlington Northern Railroad Company is a wholly owned subsidiary of Burlington Northern, Inc.

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED .....	i
LIST OF PARTIES .....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
OPINION BELOW.....	2
REASONS FOR DENYING THE WRIT.....	2
CONCLUSION .....	4

## TABLE OF AUTHORITIES

Page

## CASE:

<i>National Labor Relations Board v. Pittsburgh Steamship Co.</i> , 340 U.S. 498, 71 S. Ct. 453, 95 L.Ed. 479 (1951) .....	3
--	---

## RULES:

Rule 51, Federal Rules of Civil Procedure .....	3
Rule 17, Rules of the Supreme Court of the United States .....	2, 4

No. 90-318

---

In The  
**Supreme Court of the United States**  
October Term, 1990

---

CARL W. TINNON, LOLA TINNON, BITUMINOUS  
FIRE & MARINE INSURANCE COMPANY and  
STOR-ALL MANUFACTURING COMPANY,

*Petitioners,*

v.

BURLINGTON NORTHERN RAILROAD COMPANY,

*Respondent.*

---

On Petition For Writ Of Certiorari To The  
United States Court Of Appeals For The  
Eighth Circuit

---

**RESPONDENT'S BRIEF IN OPPOSITION**

---

Respondent, Burlington Northern Railroad Company,  
respectfully requests that this Court deny the Petition for  
Writ of Certiorari seeking to review the judgment and  
opinion of the United States Court of Appeals for the  
Eighth Circuit.

---

### OPINION BELOW

The opinion of the Eighth Circuit is reported as *Tinnon v. Burlington Northern R. Co.*, 898 F.2d 1340; it is reproduced at Appendix page 1 through page 6 of the Petition. The opinion of the United States District Court for the Eastern District of Arkansas denying the motion for new trial has not been reported; it is reproduced at Appendix, page 7 through page 9 of the Petition.

---

### REASONS FOR DENYING THE WRIT

Petitioners request that the Court issue a Writ of Certiorari but their petition never mentions Rule 17 of the rules of the Supreme Court of the United States and the considerations therein set forth governing review on certiorari. The omission is telling. The petitioners do not base their petition upon any of the reasons for review enumerated in Rule 17 because none exist.

The decision of the Eighth Circuit Court of Appeals is not in conflict with the decision of another federal court of appeals on the same matter. The case did not involve a federal question. There was no departure from the usual course of judicial proceedings by either the circuit or the district court. There are no special or important reasons for this Court to review the case.

This diversity case was heard by a jury which found on the issue of liability for the respondent railroad. The petitioners filed a motion for new trial complaining of one jury instruction given by the district court. The motion was denied on the ground that the petitioners did

not offer a specific enough objection to preserve this issue and that the case did not involve plain error. (Appendix, p. 8)

On appeal, the Eighth Circuit Court of Appeals agreed that the petitioners did not distinctly state the nature of their complaint to the jury instruction as required by Rule 51. Thus, in reviewing the instruction under the plain error standard, the Eighth Circuit decided that the alleged mistake, if any, did not seriously affect the reasonableness, rectitude, or reputation of the judicial proceedings. (Appendix, p. 6)

The Eighth Circuit, in its opinion, further decided even if the petitioners had objected properly, under the facts of this case, that the trial court had correctly instructed the jury on the applicable law. (Appendix, p. 6)

Petitioners' seven page statement of the case in this Court is a one-sided review of the way in which they perceived the facts and proceedings in the district court, which both the jury and court rejected.

The argument and reasons for allowance of the writ set forth in the petition herein are all based on their claim that the offending jury instruction was erroneous. It is not appropriate for the respondent at this time to point out all the reasons why the jury instruction was correct under the facts of this case. Suffice it to say that the Eighth Circuit Court of Appeals found that the instruction was proper. Usually this Court leaves to the circuits the interpretation of state law as applied to the particular facts of a case. *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503, 71 S. Ct. 453, 95 L.Ed. 479 (1951).



It seems evident that this case possesses none of the considerations set forth in Rule 17 that are a prerequisite to review on certiorari.

---

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. C. DEACON  
BARRETT, WHEATLEY, SMITH &  
DEACON  
P.O. Box 4057  
Jonesboro, AR 72403  
(501) 932-6694  
*Attorney for Respondent*